



Owino (Suing as the Legal Representatives and Administrator of the Estate of the late Joseph Eric Owino-Deceased) v National Bank of Kenya Ltd & another; Onyango (Suing as the Legal Representative and the Administratrix of the Estate of the late Joseph Eric Owino) (Interested Party) (Civil Case 11A of 2022) [2022] KEHC 16746 (KLR) (23 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16746 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE 11A OF 2022
RN NYAKUNDI, J
DECEMBER 23, 2022**

BETWEEN

**EMMANUEL OTIENO OWINO (SUING AS THE LEGAL REPRESENTATIVES
AND ADMINISTRATOR OF THE ESTATE OF THE LATE JOSEPH ERIC
OWINO-DECEASED) PLAINTIFF**

AND

NATIONAL BANK OF KENYA LTD 1ST DEFENDANT

JOYLAND AUCTIONEERS 2ND DEFENDANT

AND

**MARY ANYANGO ONYANGO (SUING AS THE LEGAL REPRESENTATIVE
AND THE ADMINISTRATRIX OF THE ESTATE OF THE LATE JOSEPH ERIC
OWINO) INTERESTED PARTY**

RULING

1. The applicant approached this court vide a Notice of motion dated July 25, 2022 seeking the following orders;
 1. That this application be certified urgent and service thereof in the first instance be dispensed with. (Spent).
 2. That pending the hearing and determination of the instant application the Honourable Court be pleased to enjoin the Interested Party/Applicant to this instant suit. (Spent).
 3. That pending hearing inter partes of this application and the determination thereof there be an order of temporary injunction to restrain the 1st defendant, National Bank of Kenya Limited,



its agents and / or servants from trespassing upon and / or subdividing and or transferring and or alienating and or selling and / or in any way dealing with the land parcel registration Eldoret Municipality Block/13/305.

4. That this matter be transferred to the High Court for hearing and determination. (Spent).
 5. That the Honourable Court be pleased to grant leave to the Interested Party/Applicant and/ or Legal Representatives/Administrators of the Estate of the Late Joseph Eric Owino humble and / or reasonable time to clear the loan arrears in respect of the charged property, Eldoret Municipality Block/13/305.
 6. That costs be in the cause.
2. The application is premised on the grounds set out therein and the contents of the affidavit in support of the same.

Applicant's Case

3. The applicant's case is that the interested party is one of the beneficiaries of the late Eric Owino, deceased whose estate has since been distributed vide Eldoret HC Succession Cause No 58 of 2020. The suit property was allocated to the Applicant vide the Certificate of Confirmation of Grant that was issued by the Honourable Court on March 14, 2022. It has now emerged that the said suit property which is a residential home housing the 2nd family of the deceased is due for auction by the Respondent following the loan arrears. The Applicant is therefore seeking the leave of the court to settle the said loan arrears from the proceeds of the estate held in the estate account in the joint names of the four administrators at the DTB Bank. It is only fair for the Honourable Court to allow the deceased estate settle the said loan arrears which is Ksh 1,159,000.00(Kenya Shillings One Million One Hundred and Fifty-Nine Thousand) against the suit property that is valued at Kshs 55,000,000.00 (Kenya Shillings Fifty-Five Million).
4. The Applicant having been allocated the said suit property which is a residential home be allowed to clear the arrears from the proceeds of the estate held in the joint account. The deceased estate should not be denied a right to redeem the suit property given the fact that it is a home for the 2nd house and that if it is left to be auctioned by the bank the estate shall suffer loss while the Applicant together with her family shall suffer irreparable harm/damager given the fact that it is a home where they reside. Learned counsel for the applicant cited the case of *John Karanja Njenga & another v NIC Bank Ltd* [2017] eKLR in support of his submission.
5. The Applicant has since sought for the release of the said amount owed to the bank from the estate account vide Succession Cause No 58 of 2020 pitting the late Eric Owino, the deceased herein and has since it is therefore in the interest of justice the bank be restrained from auctioning the suit property pending the release of the said amount for the settlement of the loan arrears in question.

Respondent's Case

6. The respondent opposed the application vide grounds of opposition dated September 19, 2022 and a replying affidavit of the same date.
7. The respondent's case is that the interested party/Applicant has not demonstrated which interest she is seeking from the deceased estate. Further, that on November 17, 2017 parties recorded a consent judgment and to date the loan amount has never been fully paid. The consent has never been varied or set aside and the Honourable Court has no jurisdiction or powers to open up, disturb, vary or override a consent order entered by the parties purposely and on their own free will.



8. It is true that the 1st Defendant/Respondent has issued a Forty Days Statutory Notice of Sale of the charged property Eldoret Municipality Block/13/305 in exercise of its statutory power of Sale after default of the chargor. Upon the default by the Chargor to service the loan, the 1st Defendant/ Respondent has a right to resort to the option of statutory notice of sale to recover the loan amount. The application does not affect the 1st Defendant/Respondent statutory right of power of sale over the Charged property.
9. The respondent contended that the loan has not been paid to a tune of Kshs 1,159,000/= that continues to accrue interest. Further, prayer 3 cannot be granted by the Court as the Applicant acknowledges under paragraph 4 of the supporting affidavit that they owe the bank a sum of Kshs 1,159,000/=.
10. The applicant has not demonstrated to this Honourable Court that this application meets the threshold to grant orders sought in the application dated July 25, 2022.

Issues For Determination

1. Whether the order for an interim injunction should be granted
2. Whether the applicant should be granted leave to clear the loan arrears

Whether the interim injunction should be granted

11. Before I even delve into the merits of the application I must address one pertinent issue that touches on the substratum of the application. It is not disputed that there exists a consent between the deceased and the bank dated December 17, 2017 wherein he was to pay Kshs 1,500,000/- as settlement of the loan and the property known as Eldoret Municipality Block 13/305 was to act as security. It is apparent that the respondent seeks to realise its right of statutory sale pursuant to the terms of the consent as the title documents were to be released to the applicant upon fulfilment of the terms of the consent. It is admitted by the applicant that the terms of the consent were not complied with.
12. In *SMN v ZMS & 3 Others* [2017] eKLR, the Court of Appeal stated: -

“There is no dearth of authorities on the law governing the setting aside of consent judgments or orders ... Generally, a court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties”.
13. The same issue was discussed in *Setton on Judgments and Orders* (7th Edn), Vol.1 pg. 124, where the author states that: -

“Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them... it cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement”.
14. In the premises, the courts’ hands are tied as the applicant has not set aside or varied the consent, nor has she provided any grounds for the setting aside or varying of the consent order.
15. Whereas the court is alive to the situation at hand, and considering that the applicant resides on the property, the court cannot interfere with a consent judgment and consequently cannot allow the



applicant more time to pay the arrears. I have considered the authorities cited by the applicant and make the distinction that on the present suit, the deceased had entered into a consent with the respondent and as the estate they have a duty to fulfil it. A variation or setting aside of the consent order can only be by the hand of the parties that entered into it with the court adopting the same.

16. In the premises, the application fails in its entirety and is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED AT ELDORET VIA EMAIL THIS 23RD DAY OF DECEMBER, 2022.

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R. NYAKUNDI

JUDGE

